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GOOD-WILL.

THERE are few subjects in the law which seem to be less thoroughly understood and which have in consequence given rise to more conflicting decisions than that which stands at the head of this article. In nearly every case which has arisen the opinion of the judge has been exclusively shaped by the peculiar facts before him; instead of deducing the result from a comprehensive survey of the whole field, the judicial mind has restricted itself to the narrow limits set by the facts immediately before it, and a strange confusion of ideas, sometimes in the succeeding decisions of the same judge, has been the natural and necessary consequence.

The best definition of good-will is that of Mr. Justice STORY. "Good-will," says he, "may be properly enough described to be the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices." (Story on Partnership, § 99.) Lord ELDON'S oft-repeated definition of good-will (*Cruttwell* v. *Lye*, 17 Ves. 335) is far too narrow: "The good-will * * is nothing more

than the probability that the old customers will resort to the old place." In *Churton* v. *Douglas*, Johnson's Ch. Rep. 174, V. C. Sir W. PAGE WOOD uses the following language: "It was argued that, in *Shakle* v. *Baker*, 14 Vesey 468, *Cruttwell* v. *Lye*, 17 Id. 335, and *Kennedy* v. *Lee*, 3 Meri. 452, Lord ELDON has laid down the principle, that an assignment of the 'good-will' of a trade, *simpliciter*, carries no more with it than the advantage of occupying the premises which were occupied by the former firm, and the chance you thereby have of the customers of the former firm being attracted to those premises. But it would be taking too narrow a view of what is there laid down by Lord ELDON to say that it is confined to that. 'Good-will,' I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business. When Lord ELDON is speaking of a nursery garden or a locality which the customers must frequent to look at the flowers and other things, and when Sir THOMAS PLUMER, in another case, in speaking of a retail shop which a person must enter in order to buy the goods there exposed—they are only, as it appears to me, giving those as illustrations of what good-will is. But it would be absurd to say that, where a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet street, or in the Strand or any place adjoining, and that they regard that, and do not regard the identity of the house of business—namely, the firm."

So in *Wedderburn* v. *Wedderburn*, 22 Beav. 84, the Master of the Rolls, Sir JOHN ROMILLY, says: "There is considerable difficulty in defining accurately what is included under this term 'good-will;' it seems to be that species of connection in trade which induces customers to deal with a particular firm. It varies almost in every case, but it is a matter distinctly appreciable which can be preserved (at least to some extent) if the business be sold as a going concern, but which is wholly lost if the concern is wound up, its liabilities discharged and its assets got in and distributed."

At one time before clear notions as to the full nature of good-will had attained the ascendant, this idea that it was purely local seems to have been firmly rooted. Whatever may have been Lord ELDON'S opinions, his loose expression in *Cruttwell* v. *Lye* was closely followed both in England and America. In *Chissum* v. *Dewes*, 5 Russ. 29, the unexpired term in a house and the good-will of a business established in it were sold in a creditor's suit, with the consent of a creditor of the lessee with whom the lease had been deposited as a security, and brought a less sum than the amount of the debt: Sir JOHN LEACH, M. R., said: "The good-will of the business is nothing more than an advantage attached to the possession of the house, and the mortgagee, being entitled to the possession of the house, is entitled to the whole of that advantage. I cannot separate the good-will from the lease." The whole of the proceeds of the sale was ordered to be paid into court.[1] So in *Dougherty* v. *Van Nostrand*, 1 Hoff. 68, it was held that the good-will attached to the lease of premises formerly occupied by partners, and that the value of the lease was enhanced by the good-will, which, it seems, Ass't. V. C. HOFFMAN considered to be inseparably attached thereto. So in *Williams* v. *Wilson*, 4 Sand. Ch. 379, the Vice-Chancellor ordered the receiver to sell the lease of premises occupied by partners between whom difficulties had broken out, together with the good-will, &c. In *Elliott's App.*, 10 P. F. Smith 161, READ, J., says that "the good-will of an inn or tavern is local, and does not exist independently of the house in which it is kept."

Perhaps the earliest example of good-will in the books is to be found in *Gibblett* v. *Read*, 9 Mod. 460 (17 George II.). The question was whether some shares of the profits of a newspaper subsequent to the testator's death were part of the said testator's personal estate. Lord HARDWICKE decided in the affirmative. "This has been resembled to the case of a shoemaker, and in that case, suppose the dealing has been extensive and carried on in partnership and with the father's stock, the son, who is executor, would be accountable. Suppose the house was a house of great

[1] Doubtless all that the Master of Rolls meant to decide in the foregoing case was that the mortgagee had a lien upon the good-will as well as upon the lease, or, in other words, that the lessee had made an equitable mortgage of both. Too general language is always liable to be misunderstood, and it will be seen that in New York the language of this decision was literally followed.

trade, he must account for the value of what is called the good-will of it." Defendant was accordingly charged with the profits from testator's death. Attention to this decision in later cases would have corrected the erroneous idea that good-will was necessarily and in all cases local, an idea which, as we have seen, prevailed for no inconsiderable time.

This case practically decided that the *name* of a literary production was valuable and constituted part of the good-will. For, as was said by the Master of the Rolls, in *Bradbury* v. *Dickens*, 27 Beav. 53, "the property in a literary periodical like this is confined purely to the mere title, and the title of this work is 'Household Words,' and that forms part of the partnership assets, and must be sold for the benefit of the partners, if it be of any value." This principle of the value of the mere name of a newspaper or periodical has been frequently recognised. See *Hogg* v. *Kirby*, 8 Ves. 215; *Bell* v. *Locke*, 8 Paige Ch. 75; *Holden's Adm.* v. *McMakin*, 1 Pars. Eq. 270.

Thus far we have considered the question of good-will principally as affecting but a single person. But the cases occur most frequently on disputes between partners. It has frequently been held that *the firm name constitutes part of the good-will belonging to the partnership.* In *Churton* v. *Douglas*, Johns. Ch. R. 174, the Vice-Chancellor says: "The name of a firm is a very important part of the good-will of the business carried on by the firm. A person says, I have always bought good articles at such a house of business; I know it by that name, and I send to the house of business identified by that name for that purpose. There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-mark. But the question of trade-mark is in fact the same question. The firm stamps its name upon the articles. It stamps the name of the firm which is carrying on the business on each article as a proof that they emanate from that firm; and it becomes the known firm to which applications are made, just as much as when a man enters a shop in a particular locality. And when you are parting with the good-will of a business, you mean to part with all that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. * * That the name is an important part of the good-will of

a business is obvious, when we consider that there are at this moment large banking firms, and brewing firms, and others, in this metropolis which do not contain a single member of the individual name exposed in the firm." Accordingly where the defendant *John Douglas*, formerly a member of the firm of *John Douglas & Co.*, had sold all his share in the "good-will" of the partnership to plaintiffs, who were his former partners, he was restrained from using the firm name of *John Douglass & Co.*, although his own name was *John Douglass* and he was associated with others in partnership, and the Vice-Chancellor went on to say that if the old firm name had been merely "*John Douglas*," and there had been a sale by an individual of that name of all his share in the good-will of the firm, and "that he had secured the three managing men in the former business, and was going, as here, to set up the old firm of '*John Douglas*' with these three men, I should hold then, as I hold now, that he was not at liberty to trade under such misrepresentation."

The same principle was held in *Rodgers* v. *Nowill*, 3 De G., M. & G. 614, and 6 Hare 325. *Joseph Rodgers & Co.* obtained an injunction against *John & William Nowill* and *William Rogers* from stamping the name or mark "*J. Rodgers & Sons*," with a crown and the royal initials, upon articles of cutlery. Soon after this, *W. Rodgers* entered into partnership with his father, *John R.*, and with a brother, and the three then began again to use the forbidden trade-mark, "*J. Rodgers & Sons*," together with the crown and the royal initials, and an unimportant addition thereto. Upon the plaintiffs moving to commit *W. Rodgers*, they were held entitled to the order, although the designation of "*J. Rodgers & Sons*" accurately described defendants' firm.

The case of a firm name assimilates this branch of good-will so nearly to trade-marks that it can hardly be doubted that the same principles are applicable alike to both. While, therefore, the limits of an article must preclude us from venturing upon the broad subject of trade-marks, it may not be out of place to inquire what are the general principles governing this species of property.

It was formerly thought that the sole preventive jurisdiction of a Court of Equity in regard to the improper use of a trade-mark or a firm name, or any symbol which indicated that the goods to which it was affixed was the work of a particular firm, was founded on fraud and deceit. But it was decided in an early case (*Mil-*

lington v. *Foy*, 3 Myl. & Cr. 338) that a perpetual injunction would be granted against the use by one tradesman of the trade-marks of another, although those marks had been so used *bonâ fide*, in ignorance of their being any person's property and under the belief that they were merely technical terms. Lord COTTENHAM, Chancellor, said that he had "come to the conclusion that there was sufficient in the case to show that the plaintiffs *had a title* to the marks in question, and they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time, the case is very different from the cases of this kind which usually occur where there has been a fraudulent use by one person of the trade-mark or names used by another trader." Perpetual injunction was granted. This case was decided in 1838, and was followed in 1864 by *Hall* v. *Barrows*, 33 L. J. Ch. 204. This is the most masterly exposition of the whole subject to be met with in the reports, and the reader will therefore pardon a very full citation from the opinion of Lord WESTBURY, who was then Chancellor.

"But it must be borne in mind that a name, although originally the name of the first maker, may in time become a mere trade-mark or sign of quality and cease to denote, or to be current as indicating, that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it. In such cases the name is either accepted in the market, as a brand of quality, or it becomes the denomination of the commodity itself, and is no longer a representation that the article is the manufacture of any particular person. The case of *Millington* v. *Foy*, 3 Myl. & Cr. 338, * * * is very important as establishing the principle that *the jurisdiction of this court in the protection of trade-marks rests on property, and that fraud in the defendant is not necessary for the exercise of that jurisdiction.*"

"This distinction between a name and a trade-mark must be observed. It may be true that if a name impressed upon a vendible commodity passes current in the market, not as an *indicium* of quality, but simply as a statement or assurance that the commodity has been manufactured by a particular person, the court would not sell and transfer to another person the right to use the name simply and without addition; but if the court sold the business or manufacture carried on by the owner of the name, it

would give to the purchaser the right to represent himself as the successor in business of the first maker, and in that character to use the name."

"The remaining question relates to the good-will of the business. I agree that the good-will ought to be included in any sale or valuation as a distinct subject of value, but I think it necessary that the direction to value the good-will should be accompanied by a declaration defining what is meant by the "good-will," * * that is to say, a declaration that the good-will is to be valued upon the principle that the surviving partner, if he be not the purchaser, shall not be restrained from setting up the same description of business. No such restriction could be placed on the surviving partner if the sale were made to a stranger, but, even without any such restriction, there may be a subject of value denoted by the term 'good-will,' that ought to be taken into account in making the valuation.

"* * Inasmuch as the defendant, the surviving partner has by his counsel submitted and agreed to accept and take all the stock belonging to the partnership, according to the construction which the court shall put upon the word 'stock,' * * I declare that the words 'stock belonging to the partnership,' include and denote the partnership business, * * * also that the exclusive right to use the trade-mark of the partnership is part of the property of the partnership and ought to be included in the valuation; and that the good-will of the business of the partnership ought also to be valued, and that the same is to be valued on the footing of the surviving partner being at liberty to set up and carry on the same business as the partnership."

This same view had been already entertained by Lord Chancellor CRANWORTH (1856), in the case of *Farina* v. *Silverlock*, 6 De G., M. & G. 214, and to the same effect, see 2 Dan. Ch. Pr. 1648, and *Partridge* v. *Mench et al.*, 2 Barb. Ch. 101, where Chancellor WALWORTH says "* * the court proceeds upon the ground that the complainant has a valuable interest in the good-will of his trade or business; and that having appropriated to himself a particular label or sign, or trade-mark indicating to them who wish to give him their patronage that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good-will of the complainant's

friends or customers, or of the patrons of his trade or business, by sailing under his flag without his authority and consent."

The term 'good-will' has been sometimes applied to another case, "where a retiring partner contracts not to carry on the same trade or business at all, or not within a given distance. This is an interest, which may be valued between the parties and may therefore be assigned with the premises and the rest of the effects to the remaining partner as an accompaniment of the ordinary good-will of the establishment. Good-will in the former sense is therefore an advantage arising from the mere fact of sole ownership of the premises, stock, or establishment, without reference to other persons, as rivals; and in the latter sense, as an advantage arising from the fact of excluding the retiring partner from the same trade or business, as a rival:" Story on Partnership, § 99. So in *Kennedy* v. *Lee*, 3 Mer. 440, Lord ELDON says "there is another way in which the good-will of a trade may be rendered still more valuable; as by certain stipulations entered into between the parties at the time of the one relinquishing his share in the business, as by inserting a condition that the withdrawing partner shall not carry on the same trade any longer, or that he shall not carry it on within a certain distance of the place where the partnership trade was carried on, and where the continuing partner is to carry it on upon his own sole and separate account." It is unfortunate that the loose illustration made by so great a man as Lord ELDON, understood with literal accuracy by Judge STORY, should have been preserved to confuse the student in a subject already not free from difficulty. Good-will, as we have tried to show, is a species of incorporeal personalty, and, as we shall show shortly, subject with but few exceptions to the general laws which regulate that kind of property. But what Lord ELDON speaks of is nothing more than the advantage derived and derivable from a contract, which may or may not last beyond the life of the person contracting according to the terms of the stipulation. To call this advantage good-will is to confuse by the use of popular language the exact and scientific definition of a species of property, the nature of which is only beginning to be understood, and of which, therefore, it is extremely important to keep the outlines clearly in view. We shall presently see what a variety of decisions has been occasioned by the apparent ignorance of the judge of what good-will was exactly, as we have already seen the change which has ensued regarding the

principle of equitable relief from that of fraud upon the public to that of property in the owner of a trade-mark or good-will.

It has been said that "good-will" has no application to the learned professions. Thus in *Austen* v. *Boys*, 2 De G. & J. 626, (1858), Lord CHELMSFORD says: " * * * It is very difficult to give any intelligible meaning to the term 'good-will,' as applied to the professional practice of a solicitor. * * * Where a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. * * * The term 'good-will' seems wholly inapplicable to the business of a solicitor, which had no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs; * * * to sell the good-will without any thing more, and without arranging any price, would be an agreement incapable of being enforced by specific performance." There is certainly no good reason why good-will should not exist in a firm of solicitors, and it has been well said (3d ed. of Bythewood's Precedents, vol. ix., note to form 102), "In this view of the case, it will be apparent that the distinction which has been taken between a sale of a trade and of a profession is unsound. A customer who resorts to a particular trader, because he believes him to be a fair dealer, has as much ground of complaint if the person is secretly changed as the customer of a professional man, relying on his skill, would have under similar circumstances." In England the sale of the practice of a country physician and of the business connection of a firm of solicitors, with covenant to withdraw entirely or partially from practice, is of frequent recurrence, and in this country where partnerships are so common among lawyers, large sums have been offered to an old and well-known firm for the admission of an additional partner. Thus a firm may be gradually changed so that in a few years there shall not be a single one of the old members remaining. Now all that portion of the proceeds of the business above that which the new partners would have received if they had originally associated themselves together under their own name and carried their business on in a different place, must be attributed to the good-will of the old partnership, although it must be

allowed that this species of property is much less likely to exist among professional than among business men.

In *Farr* v. *Pearce*, 3 Mad. 74, Vice-Chancellor LEACH held that, where F. had paid a premium and entered into partnership with P., a surgeon, and F. died and P. sold the good-will of the trade, the representative of F. was not entitled to a share of the money for which such good-will was sold. This was decided on the ground that the articles of agreement defined the interest which the representatives of the deceased partner were to take, and that as the good-will was not mentioned it must be held to have been the intention of the parties that it should vest in the survivor. But he went on to say, that "if the general question had arisen here, I think it would have been difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business and sell the connection for the joint benefit of himself and the estate of his deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions, and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships, &c."

This attempted distinction between commercial and professional partnerships is as we have seen untenable; nor does the reasoning adopted by the Vice-Chancellor sustain the conclusion at which he arrives. Let it be once granted that good-will can exist in a profession (and such a fact is conceivable, though the value of the good-will be immeasurably smaller in such a case than in a trade), and the conclusion at once is that on a dissolution of the partnership all the partners are entitled to share the proceeds of what is one of the assets of the firm. It is no answer to this to say that because neither partner can be prevented from continuing the business on his own account, and because the value of the connection or good-will may be utterly destroyed, the principle ceases to exist. What is true of a profession is on principle true of a business; no sound distinction can be perceived between them.

We have seen that in England the name of a firm is held to be a part of the good-will and an asset of the partnership. In *Howe* v. *Searing*, 19 How. Pr. R. 14, a different view was taken by Ass't. V. C. HOFFMAN, and it was held that a sale of the good-will of a

business not only did not confer on the vendee a right to use the name of the vendor, but that the vendor in the absence of a covenant not to trade might set up a business precisely similar to the one sold, and might continue to use the name by which the old business had become known and valuable. This decision was concurred in by Judge ROBINSON, but Judge MONCRIEF dissented from it. It is unnecessary to criticise a decision which runs counter to all the cases. Suffice it to say that it rests on a ground which in England has been considered perfectly untenable, viz.: that a business carried on under the name of an individual or individuals who have ceased all connection with the firm (either by death or otherwise) is an imposition upon the public, and will not be protected in equity. The view held on this subject in England is clearly set forth in the citations from *Hall* v. *Barrows* and *Churton* v. *Douglass*, *supra*. The point does not seem to have been raised in this country except in the case of *Howe* v. *Searing*, just quoted, but it can hardly be doubted that when the case arises again it will be decided in conformity with the English authorities. That the name of a firm is part of the good-will has been recognised also in *Lewis* v. *Langdon*, 7 Sim. 421, and *Banks* v. *Gibson*, 11 Jur. Pt. 1, 680, where Sir JOHN ROMILLY, M. R., says: "The name or style of the firm, *Banks & Co.*, was an asset of the partnership, and if the whole concern and the whole good-will had been sold, this was a trade-mark or asset which might have been sold with it." So in *Johnson* v. *Helleley*, 34 Beav. 63, the right to the purchaser "to hold himself out as the successor of the firm of *Samuel Johnson & Sons*," was sold with the business of the firm.

On the general proposition that the good-will of a firm is one of the partnership assets and valuable, see *Macdonald* v. *Richardson* and *Richardson* v. *Marten*, 1 Gif. 81; *Banks* v. *Gibson*, 11 Jur. Pt. 1, 680; *Johnson* v. *Helleley*, 34 Beav. 63; *Williams* v. *Wilson*, 4 Sand. Ch. 379; *Mellersh* v. *Keen*, 28 Beav. 453: *Bradbury* v. *Dickens*, 27 Beav. 53; *Austin* v. *Boys*, 2 De Gex & Jones 626; *Turner* v. *Major*, 3 Gif. 442; *Wedderburn* v. *Wedderburn*, 22 Beav. 84, *Willett* v. *Blandford*, 1 Hare 271; *Holden* v. *McMakin*, 1 Pars. Eq. Cas. 270; *McFarlan* v. *Stewart*, 2 Watts 111; *Musselman's App.*, 6 P. F. Smith 81; *Dougherty* v. *Van Nostrand*, 1 Hoff. 68; *Case* v. *Abeel*, 1 Paige 401; *Marten* v. *Van Schaick*, 4 Paige 479.

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(*To be continued.*)